

2-1-1975

Corporate Conspiracy: Problems of Mens Rea and the Parties to the Agreement

M. R. Goode

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Recommended Citation

M. R. Goode, "Corporate Conspiracy: Problems of Mens Rea and the Parties to the Agreement" (1975-1976) 2:1 DLJ 121.

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1. Introduction

The essence of conspiracy is the agreement or plot formed between two or more parties.¹ Thus, in *R. v. Aspinall*, for example, Brett J. A. said: “. . . the crime of conspiracy is completely committed, if it is committed at all, the moment two or more have agreed that they will do, at once and at some future time, certain things.”² It follows that criminal conspiracy may be loosely defined as a criminal contract: an agreement between two or more “persons”.³ Emphasis will be placed upon the elements of that required agreement in the discussion that follows. First, there is the subjective element, which may be defined as the need for a conspiratorial *mens rea*, constituting agreement. In the context of corporate conspiracy, the question is whether a company can be said to have *mens rea* for these purposes. Second, there is the objective element, which may be defined as the need for two or more “persons”. In the context of corporate conspiracy, the question is whether and by what means a company may be regarded as a person capable of agreement. It is this latter element which may be referred to as the requirement of “plurality”.⁴

*M. R. Goode, Assistant Professor of Law, Dalhousie University.

1. This is axiomatic. See, for example, Wright, *The Law of Criminal Conspiracies and Agreements* (Philadelphia: Blackstone Pub. Co., at 54; Harrison, *Conspiracy as a Crime and as a Tort in English Law* (London: Sweet and Maxwell, 1924) at 63; Glanville Williams, *Criminal Law: The General Part* (London: Stevens, 2nd ed., 1961) at 669-70; Tremear's *Annotated Criminal Code* (Toronto: Carswell, 6th ed., 1964) at 639; Cousens, “Agreement as an Element in Conspiracy” (1937), 23 Va.L.R. 898; Note, “Developments in the Law: Criminal Conspiracy” (1959), 72 H.L.R. 920 at 935-40; Powell, “Conspiracy Prosecutions” (1970), 13 Crim. L. Q. 34 at 34-36; *Mulcahy v. R.* (1868), L.R. 3 H.L. 300; *R. v. O'Brien* [1954] S.C.R. 666, 110 C.C.C. 1, 19 C.R. 371, [1955] 2 D.L.R. 311.

2. (1876), 2 Q.B.D. 48 at 58.

3. *Supra*, note 1. In the area of corporate conspiracy, see Rahl, “Conspiracy and the Anti-Trust Laws” (1950), 44 Ill.L.R. 743 at 752.

4. Problems of plurality also arise where a husband and wife are accused of conspiracy, and also where one of two conspirators is acquitted of the crime. On both topics, see The English Law Commission, Working Paper No. 50,

In order to explore the problems raised by the application of the law of criminal conspiracy to a company, it is necessary to explore both subjective and objective elements of the question. The discussion which follows begins with an overview of the general principles of corporate criminal responsibility which relate to the attribution of the subjective element to an artificial legal personality. These general principles lead to a discussion of the objective plurality element, which will be developed in the context of technical problems which arise where it is alleged that a company has conspired with its sole owner and director. Discussion will then turn to the special legal problems relating to conspiracy and employees generally, conspiracy and the multicorporate enterprise, and the general utility of the crime in relation to the company.

2. *The Subjective Element: Attribution of Mens Rea to the Company*

(A) Development of the Identification Theory

Early in the twentieth century, it was usually held that a company could commit some crimes, but could commit no crime that involved *mens rea*. Illustrative of this early law in the area of conspiracy is *R. v. Kellow*, in which Cussen J. held: "It is not necessary to decide absolutely that nuisance and libel are the only crimes for which a corporation can be indicted. However, they are the only ones for which there seems to be direct authority. It is sufficient to say that conspiracy depends upon evil intention, and that on such a charge, a corporation cannot be indicted."⁵ This initial

Codification of the Criminal Law, General Principles, Inchoate Offences, Conspiracy, Attempt and Incitement, (London: H.M.S.O., 1973) paras. 35-37. On husband and wife, see *R. v. Whitehouse* (1852), 6 Cox C.C. 38; *Kowbell v. R.* [1954] S.C.R. 498; *Mawji v. R.* [1957] A.C. 126, (P.C.); *R. v. Chambers* (1973), 11 C.C.C. (2d) 282, (Atla. S. C.). Conspiracy before marriage, *R. v. Robinson* (1764), 1 Leach 37, 168 E.R. 121. As to the consistency rule, see Harrison, *supra*, note 1 at 74-76. More recent treatments of the problem are: *R. v. Seguire* (1928), 49 C.C.C. 225, (Ont. S.C., App. Div.); *Forsythe v. R.*, [1943] S.C.R. 98; *R. v. Tracey* [1946] 4 D.L.R. 296, (B.C.C.A.); *Kannangara Aratchige Dharmasena v. R.* [1951] A.C. 1, (P.C.); *R. v. Amar* (1969), 69 W.W.R. 297, (B.C.C.A.); *R. v. Funnell* (1972), 6 C.C.C. (2d) 215, (Ont. C.A.); *R. v. Ellis* (1972), 6 C.C.C. (2d) 220, (Ont. C.A.); *D.P.P. v. Shannon* The Times, June 20, 1974, page 8, (H.L.). 5. [1912] V.L.R. 162 at 173, (V.S.C.), citing *R. v. Great North of England Railway* (1846), 9 Q.B. 315, 115 E.R. 1294; *R. v. Stephens* (1886), L.R. 1 Q.B. 702; *R. v. Holbrook* (1877), 3 Q.B.D. 60; 4 Q.B.D. 42. For a similar view as late as 1941, see *R. v. Fane Robinson* (1941), 76 C.C.C. 196, (Alta. S. C., App.

block to the use of the crime of conspiracy against a company, and indeed, much of the criminal law, was removed by *D.P.P. v. Kent and Sussex Contractors*⁶ and *R. v. I.C.R. Haulage Ltd.*⁷ The former case decided that a company could be convicted, as a company, of making use of a document signed by its transport officer, which was false in a material particular with intent to deceive, and making a statement in furnishing information for that document, which it knew to be false in a material particular. McNaughten J. held:

It is true that a corporation can only have knowledge and form an intention through its human agents, but circumstances may be such that the knowledge and intention of the agent must be imputed to a body corporate if the responsible agent of a company, acting within the scope of his authority, puts forward on its behalf a document which he knows to be false and by which he intends to deceive, I apprehend that, his knowledge and intention must be imputed to the company. In my opinion, the submission that the respondents could not in law be capable of a criminal intention cannot be sustained.⁸

The *Kent and Sussex* doctrine was applied almost simultaneously to the crime of conspiracy in *I.C.R. Haulage* in which Stable J. held that a company could be charged with and found guilty of conspiracy to defraud.⁹ Thus there emerged a basic theory that a company could be held responsible for an offence requiring proof of *mens rea*, because the requisite *mens rea* could be imputed to the corporate entity from the state of mind of a person, later defined and restricted, who could be said to be acting for and on behalf of the company. This has been referred to as the "identification theory".¹⁰ The basis of this theory is the identification of an

Div.), per Lunney J. A., dissenting. The history of the doctrine is outlined by Leigh, *The Criminal Liability of Corporations in English Law* (London: London School of Economics, 1969) Ch. 2-4; The English Law Commission, Working Paper No. 44, *Codification of the Criminal Law, General Principles, Criminal Liability of Corporations* (London: H.M.S.O., 1972) at paras. 10-12; Welsh, "The Criminal Liability of Corporations" (1946), 62 L.Q.R. 345.

6. [1944] K.B. 146.

7. [1944] K.B. 551.

8. *Supra*, note 6, at 156.

9. *Supra*, note 7, at 559. The test used by Stable J. was criticized by Lord Reid in *Tesco Supermarkets Ltd. v. Natrass* [1972] A.C. 153 (H.L.) at 173.

10. The phrase "alter ego" used widely to describe the theory, for example, by Yarosky, "The Criminal Liability of Corporations" (1964), 10 McGill L. J. 142 at 143-4, was disapproved by Lord Reid in *Tesco Supermarkets, id.*, at 171. Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5 uses both "alter ego" and "identification theory". The latter is used by Fisse, "Consumer Protection and Corporate Responsibility" (1971), 4 Adel. L. R. 113; "Responsibility, Prevention and Corporate Crime" (1973), 5 N.Z.U.L.R. 250.

individual with the company, and hence, attribution of his *mens rea* to that company.¹¹

(B) The Identification Theory and Vicarious Liability

The identification theory, on which the subjective element of corporate conspiracy is based, must be distinguished, for present purposes, from attribution of criminal responsibility to the company on the basis of vicarious liability.¹² Early confusion between the two concepts, accurately pointed out by Leigh,¹³ was engendered by the identification theory itself, when the courts remained unsure which agents, servants, or officials of the company were so identifiable with it to engage its criminal responsibility.¹⁴ With the subsequent development, and to a degree, clarification of the identification theory, the distinction between the theory and vicarious liability has been marked out by the courts, if not by the commentators.¹⁵ Thus, Lord Reid said:

11. So phrased by the English Law Commission, *supra*, note 5, at para. 5. In Canada, see Yarosky, *ibid.*; and Waddams, "Alter Ego and the Criminal Liability of Corporations: *Upholsterers International Union of North America, Local 1 v. Hankin and Struck Furniture, Ltd., et al.*" (1966), 24 U. T. Fac. L. R. 145.

12. See, for leading discussions on the topic of vicarious liability: Baty, *Vicarious Liability* (Oxford: Clarendon Press, 1916); Glanville Williams, *Criminal Law: The General Part* *supra*, note 1, at 266-286; Howard, *Strict Responsibility* (London: Sweet and Maxwell, 1963); Sayre, "Criminal Responsibility for the Acts of Another" (1930), 43 H.L.R. 689.

13. Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5, at 33, commenting on *D.P.P. v. Kent and Sussex Contractors Ltd.*, *supra*, note 6. Compare the confusing attitude in *Mousell Bros. Ltd. v. London and North Western Railway Co.* [1917] 2. K.B. 836, discussed by Leigh at 32-33. The case appears to have engendered confusion in the mind of Waddams, *supra*, note 11 at 146. Stable J., in *R. v. I.C.R. Haulage Ltd.*, *supra*, note 7, at 556, clearly distinguishes *Mousell* as a vicarious liability case, as opposed to the one before him.

14. See Yarosky, *supra*, note 10, at 147, where he documents the criticism that followed the case of *Moore v. I. Bresler Ltd.* [1944] 2 All E.R. 515, (D.C.). Glanville Williams, *supra*, note 12, and Welsh, *supra*, note 5, agree that there is confusion in that case between vicarious liability and the identification theory, due to confusion as to what person could engage criminal responsibility under the identification theory.

15. See Fisse, "The Distinction Between Primary and Vicarious Corporate Criminal Liability" (1967), 41 A.L.J. 203, and the authority cited at 203. Fisse submits that the distinction is clear in English law, but that Canadian law is uncertain. Waddams, *supra*, note 11, submits that prior to *Upholsterers International Union of North America Local 1 v. Hankin and Struck Furniture Ltd.* (1964), 48 D.L.R. (2d) 248, (B.C.C.A.), the distinction was clear. Thus, at 151 Waddams states that "the great weight of Canadian and English authority

Then [under the identification theory] the person who acts is not speaking or acting for the company. He is the company. There is no question of the company being vicariously liable. He is not acting as a servant, representative, agent or delegate. He is an embodiment of the company, or one could say, he hears and speaks through the person of the company, within his appropriate sphere, and his mind is the mind of the company.¹⁶

The English Law Commission reported that: "It is important to emphasize at the outset the distinction between the liability of the corporation as a person and its liability as an employee for its servants and agents, that is, vicarious liability."¹⁷ If one regards the responsibility of the company as being founded upon vicarious liability, no problem of *mens rea* arises.¹⁸ Thus, we are concerned here, in considering the subjective element of corporate conspiracy, with cases other than vicarious liability cases.¹⁹

establishes (with occasional lapses) a clear distinction between the doctrine of corporate liability (identification; *alter ego*), and that of vicarious liability". However, the following extract from the judgment of Lord J. A. in *R. v. Fane Robinson Ltd.*, *supra*, note 5 (Alta. S.C., App. Div.), which Waddams cites (at 148), scarcely amounts to clear support of this proposition nor of the assertion that "this case comes well within Viscount Haldane's principle" (at 148): "In this view, it is not necessary to disagree with the statement that the criminal law knows no such doctrine as *respondeat superior*" (emphasis added). See also, in Canada, the confusing case of *R. v. H. J. O'Connell Ltd.* [1962] Q.B. 666, (Que. C. A.); rationalized by Yarosky, *supra*, note 10, at 154-15 and see *R. v. St. Lawrence Co. Ltd.* (1969), 7 C.R.N.S. 265 at 269, (Ont. C. A.), where criminal vicarious liability is denied. The distinction does seem clear in England, despite some doubts expressed by Leigh, *supra* note 5, at 38, and see Wolff, "On the Nature of Legal Persons" (1938), 54 L.Q.R. 494.

16. *Tesco Supermarkets Ltd. v. Natrass*, *supra*, note 9, at 170. See also Viscount Dilhorne, *id.*, at 185, and the criticism of *Series v. Poole* [1969] 1 Q.B. 676 in *Tesco, id.*, at 173-4, 181, 185-6, 193, 202-3; The English Law Commission, Working Paper No. 44, *Codification of the Criminal Law, General Principles, Criminal Liability of Corporations*, *supra*, note 5, at para. 4; *R. v. Andrews-Weatherfoil* [1972] 1 W.L.R. 118, (C.A.). In *Vane v. Yiannopollos* [1965] A.C. 486 at 506, Lord Morris said: "My Lords, the principle *respondeat superior* finds no place in our criminal law."

17. The English Law Commission, *ibid.* For a comprehensive survey of the American position, reference should be made to the *Working Papers of the National Commission on Reform of Federal Criminal Laws* (Washington: U.S.G.P.O., 1970), Volume 1, at 167, heading "Staff Memorandum 1, Existing Law".

18. Waddams, *supra*, note 11, at 146.

19. Although, vicarious liability may, in theory, become relevant. See Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5, at 75:

"Where crimes involving *mens rea* are in issue, however, the problem arises of determining what acts are to be ascribed as personal to the corporation and which are to be actions for which only vicarious liability, albeit liability involving intent, is to be ascribed."

*(C) Who May Engage Corporate Responsibility?**The Scope of the Theory*

The question now to be examined is which corporate officers may be identified with the company in order to engage its criminal responsibility. As will be shown, this question is crucial to the objective element of corporate conspiracy, as well as defining the limits of the subjective element. The dictum that paved the way for the identification theory now has its prime significance in the definition of those who may be identified with the company. In *Lennard's Carrying Company Ltd. v. Asiatic Petroleum Co. Ltd.*, Viscount Haldane said that: “. . . a corporation is an abstraction, it has no mind of its own any more than it has a body of its own; its active and directing will must consequently be sought in the person of somebody who for some purposes may be called an agent, but who is really the directing mind and will of the corporation, its very ego and the centre of the personality of the corporation”²⁰ Also of importance is the much quoted test of Denning L. J. in *H. L. Bolton (Engineering) Co. Ltd. v. T. J. Graham & Sons Ltd.*:

A company may in many ways be likened to a human body. It has a brain and nerve centre which controls what it does. It also has hands which hold the tools and act in accordance with directions from the centre. Some of the people in the company are mere servants and agents who are nothing more than hands to do the work and cannot be said to represent the mind or will. Others are directors and managers who represent the directing mind and will of the company, and control what it does. The state of mind of these managers is the state of mind of the company and is treated by the law as such.²¹

20. [1915] A.C. 705 at 713-4, (H.L.). See also Lord Dunedin, *id.*, at 715: “. . . he was the *alter ego* of the company. He was a director of the company, I can quite conceive that a company may be entrusting its business to one director be as truly represented by that one director as in ordinary cases it is represented by the whole board” Compare Viscount Haldane’s concept of a company with his speeches in *Sinclair v. Brougham* [1914] A.C. 398 and *Bonanza Creek Gold Mining Co. v. The King* [1916] 1 A.C. 566.

21. [1957] 1 Q.B. 159 at 172, (C.C.A.). See *Tesco Super-Markets Ltd. v. Nattrass*, *supra*, note 9, at 171, *per* Lord Reid:

“There have been attempts to apply Lord Denning’s words to all servants of a company where work is brain work, or who exercise some managerial discretion under the direction of superior officers of the company. I do not think that Lord Denning intended to refer to them.”

Id., at 187, *per* Viscount Dilhorne:

“. . . one has in relation to a company to determine who is or who are, for it may be more than one, in actual control”

Compare Fisse, *supra*, note 15, at 207:

In both Canadian and English law, the issue remains the subject of many vague general words, and imprecise tests. It is almost possible to list as many tests as there are cases. In *R. v. Canadian Allis Chalmers Ltd.*, Orde J., for the Ontario Supreme Court, refused to draw any line and held merely that a minor servant of the company does not constitute the "nerve and brain centre."²² His Lordship concluded that whether the corporate official in question may be identified with the company depends upon the circumstances of the case, the nature of the company's business, and the amount and nature of authority delegated by the directors.²³ The question for His Lordship was who was "in authority". With respect, that is but to restate the problem.

In *Tesco Supermarkets Ltd. v. Natrass*, Lord Diplock answered the question by limiting the definition of those who would be capable of engaging corporate criminal responsibility to those "who by the memorandum and articles of association or as a result of action taken by the directors, or by the company in general meeting pursuant to the articles, are entrusted with the exercise of the powers of the company."²⁴ This view cannot be correct. It had been criticized before *Tesco Supermarkets* as being too restricted,²⁵ and inadequate to meet the needs of the implementation of criminal policy.²⁶ Fisse commented: "However, such an approach seems to

"However, reliance upon such anthropomorphic conceptions as the 'brain' and 'nerve centre' and upon the distinction between 'primary' and 'secondary' organs implicit in the above statement [by Denning L.J.] can only blunt or possibly obliterate the distinction between primary and vicarious corporate liability."

22. (1927), 48 C.C.C. 63 at 81, (Ont. S.C., App. Div.). Other Canadian cases of interest are: *R. v. North Western Hotel Co. Ltd.* (1943), 80 C.C.C. 273, (Sask. K. B.); *R. v. Hawinda Taverns Ltd.* (1955), 112 C.C.C. 361, (Ont. Co. Ct.); *Barreau De Richilieu v. St. Jean Automobile Ltee* [1957] Que. S.C. 310; *R. v. J. J. Beamish Construction Co. Ltd.* (1967), 59 D.L.R. (2d) 7, (Ont. S.C.); *R. v. Racey, MacCallum and Associates Ltd.* [1967] 2 C.C.C. 197, (Ont. Mag. Ct.); *Re Black and Decker Manufacturing Co. Ltd. and The Queen* (1973), 11 C.C.C. (2d) 470, (Ont. C.A.); (1974), 15 C.C.C. (2d) 193, (S.C.C.).

23. This part of Orde J.'s judgment draws heavily upon that of Stable J. in *R. v. I. C. R. Haulage Ltd.*, *supra*, note 6, at 559, disapproved by Lord Reid in *Tesco Supermarkets Ltd. v. Natrass* *supra*, note 9.

24. *Supra*, note 9, at 199-200, (H.L.). A similar view was expressed by Powell, *The Law of Agency* (London: Pitman, 2nd ed., 1961), at 293 and Welsh, *supra*, note 5.

25. Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5, at 45.

26. Fisse, *supra*, note 15, at 208.

rest upon the patently false assumption that a corporation's constitution reflects the true nature of its managerial functions. Not only is the assumption false but also it conduces to evasion.''²⁷

Lord Reid comes closest to a workable test. He begins with the company's directors, who are clearly within the test. The hard case is the one in which the directors have delegated their authority. The question, says Lord Reid, is whether in these cases, the delegate may be said to act *as a director*.²⁸ However, the test remains far from clear and is patently strained and artificial. Under Lord Reid's test, one considers who may be identified as the company by considering who may be identified as a director. The English Law Commission could state that the class of individuals was generally clear, but the exact boundaries, the "hard cases", remain doubtful.²⁹ Andrews commented: "Who are these people? . . . The artificiality of the whole idea can easily be shown . . . Companies have a complexity of directing minds and wills which can conflict, exceed their duties, behave negligently, forget, act aggressively and so on, perhaps rarely in unison.''³⁰

The persons so far found sufficient have included directors,³¹

27. Fisse, "Consumer Protection and Corporate Criminal Responsibility", *supra*, note 10, at 121, citing *Lamb v. Toldeo-Berke Pty. Ltd.* [1969] V.R. 343, (V.S.C.). Note that the English Law Commission, *supra*, note 5, at para. 5, accepts Lord Diplock's test if it means the same as Lord Reid's which follows *infra*, note 28. It does not appear to do so. Canadian law has not accepted so restricted a rule.

28. *Supra*, note 9, at 171:

Normally the board of directors, the managing director, and perhaps other superior officers of a company carry out the functions of management and speak and act as the company. Their subordinates do not. They carry out orders from above and it can make no difference that they are given some measure of discretion. But the board of directors may delegate some part of their functions of management giving to their delegate full discretion to act independently of instructions from them. I see no difficulty in holding that they have thereby put such a delegate in their place so that within the scope of the delegation he can act as the company. It may not always be easy to draw the line . . .

See also Viscount Dilhorne, *id.*, at 187.

29. The English Law Commission, Working Paper No. 44, *Codification of the Criminal Law, General Principles, Criminal Liability of Corporations*, *supra*, note 5, at para. 5, and para. 39. Leigh, *supra*, note 25, Fisse, *supra*, notes 26 and 27 and Glanville Williams, *Criminal Law: The General Part*, *supra*, note 1, at 269, 273-284, all admit the test is quite uncertain and in hard cases, unusable.

30. Andrews, "Reform in the Law of Corporate Liability" [1973] Crim. L.R. 91 at 93.

31. *Lennard's Carrying Company v. Asiatic Petroleum Co. Ltd.*, *supra*, note 20; *Mousell Bros. Ltd. v. London and North Western Railway Co.*, *supra*, note 13 especially at 842, 844; *R. v. Canadian Allis-Chalmers Ltd.*, *supra*, note 22; *R. v.*

managing directors,³² branch managers,³³ president of an association,³⁴ a weighbridge officer,³⁵ a foreman,³⁶ a secretary,³⁷ and a project engineer.³⁸ This variety would suggest practical difficulties. It is proposed to adopt, as a putative definition, that proposed by Leigh, as a result of his analysis of the jurisprudence. He suggests that the person should be exercising a "managerial function" and that the person should "enjoy all relevant powers of control over that aspect of business to which it relates".³⁹ Further, "his actions are likely to reflect an underlying corporate policy."⁴⁰ This definition, or series of definitions, while subject to criticism, is subject to less than most, and serves as a guide to the operation of the theory.

(D) *The Limitation of Scope of Authority*

An important limitation to the identification theory is the principle that, if the person "identified" for the purposes of the theory is acting outside his authority, his mental state cannot be imputed to the company.⁴¹ This principle was emphasised in Canada in *R. v.*

Fane Robinson Ltd., *supra*, note 5; *R. v. R. v. I. C. R. Haulage Ltd.*, *supra*, note 7. See generally, Leigh, *supra*, note 5, at 92-97.

32. Leigh, *id.*, at 45; *R. v. I. C. R. Haulage Ltd.* *supra*, note 7; *Barreau De Richilieu v. St. Jean Automobile Ltée*, *supra*, note 22. See also *D.P.P. v. Kent and Sussex Contractors Ltd.*, *supra*, note 6; *Grain Sorghum Marketing Board v. Supastok Pty. Ltd.* [1964] Qd. R. 98, (Q.S.C.), (general managers); *The Lady Gwendolen* [1965] 2 All E.R. 283, (C.A.), (assistant managing director).

33. *Morre v. I. Bresler Ltd.*, *supra*, note 15; *D.P.P. v. Kent and Sussex Contractors Ltd.*, *supra*, note 6; *Tesco Supermarkets Ltd. v. Natrass*, *supra*, note 9.

34. *R. v. Electrical Contractors Assoc. of Ontario and Dent* (1961), 27 D.L.R. (2d) 193, (Ont. C.A.).

35. *John Henshall (Quarries) Ltd. v. Harvey* [1965] 2 Q.B. 233 (D.C.).

36. *The Queen v. H. J. O'Connell Ltd.*, *supra*, note 15.

37. *Moore v. I. Bresler Ltd.*, *supra*, note 15, where the secretary was also a manager: see also *R. v. Fane Robinson Ltd.*, *supra*, note 5; *Meulen's Hair Stylists Ltd. v. C.I.R.* [1963] N.Z.L.R. 797.

38. *R. v. Racey, MacCallum and Associates Ltd.*, *supra*, note 22. See also *Magna Plan v. Mitchell* [1966] Crim. L. R. 394, (D.C.).

39. Leigh, *The Criminal Liability of Corporations in English Law* *supra*, note 5, at 39.

40. *Id.*, at 46. For interesting alternative approaches, see Winn, "The Criminal Responsibility of Corporations" (1929), 3 Camb. L. J. 398; Downey, "Aiding and Abetting A Statutory Offence" (1959), 22 Mod. L. R. 91. "It should also be noted that prior to the *O'Connell* decision in 1962, in every case in which a corporation was convicted of a criminal offence requiring *mens rea*, the guilty acts were committed by directors of the corporation." Yarosky, *supra*, note 10, at 155.

41. In the United States, the "scope of authority" limitation is not so clear. In

Ash Temple, a conspiracy case, in which Robertson C. J. O. held that: "It is well settled that conspiracy is one of the crimes that a company can commit and that the necessary mens rea may be found in an officer, servant, or agent *authorized* by the company to act for it . . . if the act relied on is that of an officer, servant or agent of the company, there must be evidence that he had *authority* from the company to do the act."⁴² To the extent that His Lordship implies that authorization alone renders the company criminally responsible, he is wrong. The law requires that the servant, agent or officer be also of sufficiently high rank to be identified with the company.

(E) Conclusion

It may be seen that, through the general criminal law, the crime of conspiracy has overcome the subjective element of conspiratorial *mens rea*, although it can hardly be said that the law is either clear or satisfactory. The problems that arise, as to the subjective element, in the application of the crime of conspiracy to the company are those of the general criminal law, and will be resolved if and when those general problems are resolved.

(3) The Objective Element (1): The "One Man Company"

Having formulated a general concept as to who may be identified with the company for the purposes of proof of *mens rea* in criminal cases generally, a corresponding understanding may be gained of

Note, "Developments in the Law: Criminal Conspiracy", *supra*, note 1, at 951-2, it is implied that an agent must act within the scope of his authority. However, see *Working Papers of the National Commission on Reform of Federal Criminal Laws*, *supra*, note 17, at 171-2, which implies the contrary. The English portion is summarized by the English Law Commission, Working Paper No. 44, *Codification of the Criminal Law, General Principles, Criminal Liability of Corporations*, *supra*, note 5, para. 9, citing *Moore v. I. Bresler Ltd.*, *supra*, note 15. See also Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5, at 46-51; Fisse, "Responsibility, Prevention and Corporate Crime" *supra*, note 10, at 256, (ratification); *D.P.P. v. Kent and Sussex Contractors Ltd.*, *supra*, note 6, at 156; *R. v. Stanley Haulage Ltd.* (1964), 114 L.J. 25; *John Henshall (Quarries) Ltd. v. Harvey*, *supra*, note 35; *Tesco Supermarkets Ltd. v. Nattrass*, *supra*, note 9, at 171, *per* Lord Reid, and 200, *per* Lord Diplock. On the question of acts detrimental to the company, see *R. v. Howard Smith Paper Mills Ltd.* [1954] O.R. 543, (Ont. H.C.), and *Standard Oil Co. of Texas v. United States* (1963), 307 F. 2d 120, (Fifth Circuit).

42. (1949), 93 C.C.C. 267 at 279-80, (Ont. C.A.). My emphasis. See also *R. v. Canadian Allis-Chalmers Ltd.*, *supra*, note 22; *R. v. St. Lawrence Corp.* *supra*, note 15, at 273, (Ont. C.A.).

who may agree for the company, and how. With respect to the objective element, it is clear that no problem arises where one company is charged with conspiring with another company, for here there are two persons, however artificial. Similarly, conspiracy between a company and another person unconnected with the company is unobjectionable, so long as *mens rea* may be attributed to the company in the normal way.

However, where it is alleged that a company has conspired with the one man who owns and directs its operations, acute problems of plurality arise. In general, where conspiracy is charged between a company and its director, a crisis of identity arises, if by "director" one refers to him who may engage corporate criminal responsibility. In the discussion which follows, "director" will bear that meaning and "employee" will refer to the lower echelon servants of the company.

Where it is alleged that a director has conspired with his company, the requisite corporate *mens rea* can only be attributed to the company through the director. However, if that is done, conceptually the director and the company are the same, and there are not two minds in agreement, but one alone. To hold otherwise would be to find conspiracy in *every* case where a director has committed a crime. Where the company is owned and solely controlled by the director, the "crisis of identity" is even more obvious. Thus: "Where the corporation is controlled by a single individual the distinct social reality of the corporate personality may be non-existent. The corporate entity instead tends to directly reflect the personality of the individual. In such cases the extent to which the two personalities are separated depends wholly upon a legal device."⁴³ Having pierced the corporate veil for one purpose, it is difficult to justify refusing to do so for another.

In *R. v. McDonnell*,⁴⁴ the accused was a director and sole owner of two companies. He was charged with conspiring with each company to commit various fraudulent activities. Nield J. held that the indictment could not stand:

... where the sole responsible person in the company is the defendant himself, it would not be right to say that there were two persons or two minds. If it were otherwise, I feel that it would offend against the basic concept of a conspiracy, namely, an agreement of two or more to do an

43. Woods, "Lifting the Corporate Veil in Canada" (1957), 35 C.B.R. 1176 at 1177.

44. [1966] 1 Q.B. 233, (Bristol Assizes).

unlawful act, and I think it would be artificial to take the view that the company, although it is clearly a separate legal entity, can be regarded here as a separate person or a separate mind, in view of the admitted fact that this defendant acts alone so far as these companies are concerned.⁴⁵

His Lordship went on to extend this principle to any case where a company is charged with conspiring with one of its directors.⁴⁶ Thus, this case may be regarded as an aggravated example of a general principle, since it is not possible to speak of the *mens rea* of the company without speaking of the *mens rea* of the particular director.⁴⁷ Since the identification theory *deems* the embodiment of the company in the mind of the director, the company and the director are the *same person* for this purpose.⁴⁸ It follows that conspiracy may not be charged.

Leigh, commenting on *McDonnell*, has suggested that the essence of the problem is not the lack of two persons but the lack of two minds.⁴⁹ While having a certain superficial attractiveness, the distinction is unsound and unnecessary. First, it confuses the

45. *Id.*, at 245.

46. *Id.*, at 246:

"... the true position is that a company and a director cannot be convicted of conspiracy when the only human being who is said to have broken the law or intended to do so is the one director, and that is the situation in the present case."

47. Thus, for example, Lord Reid said:

"He is an embodiment of the company, or, one could say, he hears and speaks through the persona of the company . . . and his mind is the mind of the company."

Tesco Supermarkets v. Natrass, *supra*, note 9, at 170.

48. *Ibid.* See also the discussion of the English Law Commission, Working Paper No. 50, *Codification of the Criminal Law, General Principles, Inchoate Offences, Conspiracy, Attempt and Incitement*, *supra*, note 4, para. 34, where *McDonnell* is said to be right as to both wide and narrow ratios. Leigh also agrees; *supra*, note 5, at 53-4. There are other cases in English law which pierce the corporate veil in a similar way, but in quite different contexts. Examples are: *F. A. Clark & Son v. I.R.C.* [1941] 2 K.B. 270; *British American Tobacco Ltd. v. I.R.C.* [1943] A.C. 335; *I.R.C. v. J. Bibby & Sons Ltd.* [1945] 1 All E.R. 667, (H.L.); *Firestone Tyre & Rubber Co. Ltd. v. Lewellin* [1957] 1 W.L.R. 464, (H.L.); *S. Berendson Ltd. v. I.R.C.* [1958] Ch. 1, (C.A.); *Unit Construction Co. Ltd. v. Bullock* [1960] A.C. 351.

49. Leigh, *supra* note 5, at 54: "Thus clearly, there were two persons involved. It could not, however, be said that there were two minds involved." Leigh, *id.*, at 54, also says that Nield J. concluded: "... that while the company is an entity separate from its *alter ego* its liability is predicated on an identification of the actions of its *alter ego* with it." Footnote 103 alleges that the distinction was explicitly drawn by Nield J., but no specific reference is given. It is submitted that not only is the distinction incorrect, but Nield J. never made it. The words "*alter ego*" do not appear in the judgment.

objective and subjective elements of conspiracy. The identification theory, by making a party of the company for the purposes of the subjective question, has simply confused the objective question in this particular crime as a consequence. Second, the root of the plurality problem, as with conspiracy between husband and wife, lies in the application of a two party crime to an essentially one party situation.⁵⁰ In particular, the company is an artificial person created for the economic realities of the twentieth century, and a medieval crime must have difficulty in adaptation.

In Canada, *R. v. Martin*⁵¹ demonstrates similar reasoning to *McDonnell*. In that case, a conspiracy was alleged between M, his codirector A, an auditor H, and the company. The company was owned and controlled by M. The court found that A and H had not conspired and held that:

. . . . [M] was the sole actor in the management and control of the company. When Allison and Hare are eliminated, the charges disappear, for the company could have no mens rea apart from that of Martin himself.⁵²

In *R. v. I.C.R. Haulage Ltd.*,⁵³ the company was charged with conspiring with R, R's wife, two employees and other persons. R owned all but one share in the company, which was owned by his wife. It is submitted that the *Martin-McDonnell* reasoning applies equally to this case. A conspiracy charge against A, B and C, for example, alleges that A conspired with B, and C, that B conspired with A and C, and that C conspired with B and A. Where A is a company and B is its owner-director, it is clear that A may conspire with C, but not B, that B may conspire with C and not A, and that C may conspire with B. Thus, the indictment in *I.C.R. Haulage* should have been held defective insofar as the owner-director, R, was charged with conspiring with the company. This defect could

50. Nield J. in fact said: ". . . it would not be right to say that there were two persons or two minds." [1966] 1 Q.B. 233 at 245; (my emphasis). Similarly, in *Union Pacific Coal Co. v. U.S.* (1909), 173 F. 737 at 745, (U.S.C.A., Eighth Circuit), the court said: "The union of two or more persons, the conscious participation of two or more minds . . .". The basis of the husband-wife rule is lack of two persons: Card, "The Working Paper on Inchoate Offences: (2) Reform of the Law of Conspiracy" [1973] Crim. L. R. 674 at 679. The acquittal rule is based on the lack of two minds: Glanville Williams, *Criminal Law: The General Part*, *supra*, note 1, at 669-671.

51. [1933] 1 D.L.R. 434, (Man. C.A.).

52. *Id.*, at 440-1, *per* Dennistoun J. A. See also Woods, *supra*, note 43, at 1186.

53. *Supra*, note 7. The facts are omitted from the Kings Bench Report, but see [1944] 1 All E.R. 691 at 692.

have been remedied by specific and separate counts. However, Stable J. did not direct his mind to the issue.

The American jurisprudence reveals a similar approach, although it is important to note that almost any employee may be a "director" for the purposes of the attribution of criminal responsibility, and thus questions of plurality are correspondingly far reaching.⁵⁴ In *Goldlawr Inc. v. Schubert*,⁵⁵ it was held that there can be no conspiracy between a company and its sole shareholder.⁵⁶ A similar result was reached in *Union Pacific Coal Co. v. United States*⁵⁷ in which a conspiracy was charged between a company and one of its senior officials.⁵⁸ An interesting authority to the contrary is *Wood v. United States*,⁵⁹ in which a director objected that to convict the company and himself would be to expose him to double jeopardy: he would be penalized as a shareholder as well as an individual. The court rejected this contention:

If a man for his own convenience chooses to conduct any business through a corporation, he is estopped to say that he and the corporation are one person and not two. He may not obtain for himself the limitation of liability and the other advantages which flow from the conduct of the business by the corporation and then when it suits him say that there is no difference between him and the corporation. For the purposes of this case, it is immaterial whether Wood owned one share of the corporate stock or all of it.⁶⁰

In *Standard Oil v. State*, it was held that a company could conspire with its directors,⁶¹ but writing after that decision, Hall summarized

54. See *infra*, note 92.

55. (1960), 276 F. 2d 614 at 617, (U.S.C.A., Third Circuit).

56. Applying *Nelson Radio and Supply Co. Inc. v. Motorola Inc.* (1952), 200 F. 2d 911, (U.S.C.A., Fifth Circuit). For a detailed discussion of the American position, see Stengel, "Intra-Enterprise Conspiracy under Section 1 of the Sherman Act" (1963-4), 35 Miss. L.J. 5, and below, note 92 ff.

57. *Supra*, note 56. See also *Robert E. Hicks Corp. v. National Salesmen's Assoc.* (1927), 19 F. 2d. 963, (U.S.C.A., Seventh Circuit).

58. *Id.*, at 745:

". . . [If this indictment were upheld] the distinction between the commission of an offence and a combination to commit it by a corporation vanishes into thin air; for a corporation can act only by an agent, and every time an agent commits an offence within the scope of his authority under this theory the corporation necessarily combines with him to commit it. This cannot be, and it is not, the law. The union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination, and it cannot be created by the action of one man alone."

59. (1913), 204 F. 55, (U.S.C.A., Fourth Circuit).

60. *Id.*, at 56.

61. (1907), 117 Tenn. 618, 100 S.W. 705 at 717. The decision was of general application:

the American law: “. . . there can be no conviction for conspiracy where a plurality of parties is logically necessary for the crime, since the corporation could not be held for any affirmative crime unless one of its agents acted on its behalf.”⁶² It is therefore submitted that there can be no conspiracy between a company and its owner-director. From this it follows that a director cannot conspire with his company, for the same rationale applies to both cases. Conspiracy may be validly charged between three persons, except insofar as it is implied that a company may conspire with one of its directors.

(4) *The Objective Element (2): A Company and its Directors*

(A) *Conspiracy Between a Company, One Director, and an Employee*

As indicated above, it is submitted that an indictment alleging conspiracy between a company, a director, and another person or persons, raises a question of parties. The essence of such cases as *I.C.R. Haulage*⁶³ is that it alleges the three conspired *together* and thus that the director conspired with the company.

The point has not been taken, and what authority there is, tends to the contrary. For example in *Egan v. Barrier Branch of the Amalgamated Miners Association* it was decided that a trade union and its members can be party to a civil conspiracy, whether the members be officers of the union or not.⁶⁴ This was accepted by the Australian High Court in *Williams v. Hursey*.⁶⁵ Glanville Williams states: “However, if a director on behalf of his company conspires with another, the director, company and third person may together

“We are of the opinion that, independent of statute upon principle and in furtherance of social public policy, both corporations and their officers and agents who engage in the conspiracy must be held to be parties to it, and be counted in computing the necessary number to constitute it.” *Id.*, at 718.

62. Hall, “The Substantive Law of Crimes, 1887-1936” (1937), 50 H.L.R. 616 at 648, accepted as stating the American position by Glanville Williams, *supra*, note 1, at 861; Note, “Developments in the Law: Criminal Conspiracy”, *supra*, note 1, at 952 n. 216.

63. *Supra*, note 7. This point was impliedly raised by the English Law Commission, Working Paper 50, *Codification of the Criminal Law, General Principles, Inchoate Offences, Conspiracy, Attempt and Incitement*, *supra*, note 4, para. 34 n. 42.

64. (1917), 17 S.R. (N.S.W.) 243 esp. at 257-8, relying upon *Brisbane Shipwrights' Provident Union v. Heggie* (1905), 3 C.L.R. 686, (H. C. Aust.).

65. (1959), 103 C.L.R. 30 at 129, (H. C. Aust.) *per* Menzies J.

be convicted of conspiracy''.⁶⁶ For this proposition, American authority of doubtful application, and *R. v. Martin* are cited.⁶⁷ Both are very doubtful support.

(B) Conspiracy Between a Company and Two of its Directors

What of the case where it is alleged that the company has conspired with two or more of its directors? In such a case, Glanville Williams points out, there are two minds and so, he submits, an indictable conspiracy.⁶⁸ However, Leigh inclines to the contrary view,⁶⁹ and Waddams points out that "[s]uch a situation could raise difficult conceptual problems"⁷⁰ The question is whether there may be two or more directors for the purposes of the identification theory, and if so, what problems follow from that finding.

It seems that both as a matter of law and as a matter of common sense, one company may have more than one person capable of engaging corporate criminal responsibility in any given case.⁷¹ Thus, in *Tesco Supermarkets*, Viscount Dilhorne said that: ". . . . one has in relation to a company to determine who is or who are, for it may be more than one, in actual control of the operations of the company"⁷² In *R. v. St. Lawrence Corp. Ltd.*, Schroeder J.A. held: "It follows from the cases which I have discussed that a company can have more than one directing mind or alter ego."⁷³ Thus, in *R. v. Fane Robinson Ltd.*, the Supreme Court of Alberta held that two persons constituted the acting and directing will of the company.⁷⁴

66. Glanville Williams, *Criminal law: The General Part*, *supra*, note 1, at para. 281.

67. *R. v. Martin*, *supra*, note 51. The doubtful relevance of U.S. authority is discussed, *infra*, note 92 ff.

68. Glanville Williams, *supra*, note 1, at para. 281.

69. Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5, at 55.

70. Waddams, *supra*, note 11, at 147-8.

71. As well as the law cited below, see Waddams, *id.*, at 147-8:

"It would seem as a general rule that there can only be one *alter ego* of a company at any particular time. But in some cases, . . . it is hard to avoid the conclusion that there may be more than one But such a situation must be rare"

Waddams raises the problem where one possible director acts in opposition to another. The problem does not affect conspiracy, which presupposes agreement.

72. *Tesco Supermarkets Ltd. v. Nattrass*, *supra*, note 9, at 187, (H.L.).

73. *Supra*, note 15, at 273, (Ont. C. A.).

74. *Supra*, note 5, at 203, (Alta. S. C., App. Div.). "In my opinion George Robinson and Emile Fielhaber were the acting and directing will of Fane Robinson

The courts have not really determined how the concept operates. It is implied in *Fane Robinson* that the company with two directors has one composite *mens rea*. But in such a case, the company has, in common sense, no mind at all. For example, if three directors are charged with conspiring with the company, and one is acquitted, must the company also be acquitted if the company's *mens rea* is to be that of all three?

Conversely, if either director is the company, then one can only reach the conclusion that director A can conspire with the company because director B's intent is imputed to it, and director B can conspire with the company because director A's intent is imputed to it. This is all very complex and far removed from reality. Again, the structure breaks down where one director is acquitted.

The logical and conceptual problems which arise from problems such as these indicate that the crime of conspiracy is simply inappropriate to deal with corporate crime — particularly large scale corporate crime.⁷⁵ If possible, it would surely be simple in any case to charge the substantive crime which is the object of the conspiracy, against the party or parties where the sanction should strike. In any case, if the sanction should be directed against the shareholders, prosecute the company.⁷⁶ If it is appropriate, prosecute the directors. The use of the wide net of conspiracy reveals a failure to consider the appropriate object of the criminal sanction. It is freely conceded that difficult logical or conceptual technicalities should not impede the necessary implementation of criminal policy and social standards: the question is rather whether conspiracy is the best vehicle for enforcement. In the application of a criminal offence, such as conspiracy, to a situation for which it was not designed, conceptual difficulties inevitably arise in squaring the crime with its new purpose.

One further problem must be mentioned. Where one director knows fact A, and another director fact B, and knowledge of facts A and B are necessary to constitute a given crime, then, as a result of dual imputation, the company may arguably be criminally responsible. The English Law Commission rejected such an argument, arguing that at least one director have the whole *mens*

Ltd. generally and in particular'' Accord, *Minnisohn v. U.S.* (1939), 101 F. 2d. 477, (U.S.C.A., Third Circuit).

75. See Andrews, *supra*, note 30, at 93.

76. See Woods, *supra*, note 43, at 1181.

rea.⁷⁷ In cases of conspiracy, however, we may require more than one director to have the whole *mens rea*, as where two directors are charged with conspiring with the company.

(C) *The Director who Acts in More Than One Capacity*

In *R. v. Electrical Contractors Association of Ontario and Dent*,⁷⁸ the company was an incorporated association of which D was the president and director. The association was organized into groups of members, one of which was Zone 20. D was an officer and director of Zone 20. The association, Zone 20 and D were charged with conspiracy to unduly lessen competition, together with another company, Roxborough Electric, which was owned and controlled by D. Other persons were charged as coconspirators, but these persons may be ignored in studying the reasoning of the court, which found all accused guilty:

. . . . it is not necessarily a defence to an indictment against a corporation under that section that only one human being intended to break the law. That person might act in more than one legal capacity. For instance, he might be a director of more than one corporation or he might have personal interests of the same kind as that of a corporation of which he is a director. Thus, he may be regarded as though he were two separate persons and two separate minds. In the instant case, the intention of Dent as president and director of the appellant corporation may be imputed to the appellant so as to be the intention and will of the association, while, at the same time, the intention and will of Dent as a person in control of Roxborough Electric Ltd. may be imputed to that corporation so as to be its intention and will⁷⁹

It followed that Dent and his company and his association could conspire together.⁸⁰ It is submitted that this reasoning is wrong and should not be followed. There are three major criticisms that may be directed against it.

Firstly, the argument proves too much insofar as it would dissolve into thin air the whole question of intracorporate plurality. For example, the court cited *I.C.R. Haulage*⁸¹ as authority for dual

77. The English Law Commission, Working Paper No. 44, *Codification of the Criminal Law, General Principles, The Criminal Liability of Corporations*, *supra*, note 5, at para. 39(d). A similar view is expressed by Leigh, *supra*, note 5, at 57. But see *Inland Freight Lines v. U.S.* (1951), 191 F. 2d. 313, (U.S.C.A., Tenth Circuit).

78. *Supra*, note 34.

79. *Id.*, at 200.

80. *Ibid.*

81. *Supra*, note 7. Also citing *Glanville Williams on Criminal Law* (1953) at 683: presumably the first edition of *Criminal Law: The General Part*, *supra*, note 1.

legal capacity, since in that case, the director, the company, and a third person were held guilty of conspiracy.⁸² It follows that the court recognized that *I.C.R. Haulage* involved a problem of parties, although Stable J. did not advert to it, and that the dual legal capacity argument solved the problem. Such an assumption is entirely unwarranted. It was submitted above first, that Stable J. did not see the problem, and second, that if he had, the indictment could not stand. This approach is shared by the English Law Commission,⁸³ and *I.C.R. Haulage* is not, and should not be, law on this point. The dual legal capacity argument would solve the problem of the "one man company." However, the case and the argument were explicitly rejected by Nield J. in *McDonnell* on the ground that it would offend against basic conspiracy requirements.⁸⁴ *McDonnell* attacks the very basis of *Electrical Contractors*.

Secondly, *Electrical Contractors* piles fiction upon fiction, although, no doubt, for utilitarian purposes. By a fiction, the director is considered to have two minds, one as a person, the other as a company. By a further fiction, his mind as a company is deemed to be that of the company, which being an artificial person, can only be considered to have *mens rea* by a fiction. Such legal sophistry has little to commend it. That it is needed to attack corporate wrongdoing and further the application of criminal or social policy points to a need for a reassessment of the role that the crime of conspiracy plays in the implementation of legislature policy. Are these fictions necessary at all?

Thirdly, it is argued that the result of the dual legal capacity argument is an overreach of the criminal sanction. In *Electrical Contractors*, the sanction should have been directed to the real culprit: Dent. Once it is said that an accused director may act in

82. *Supra*, note 34, at 200: "Finally, it may be stated on the authority of *R. v. I.C.R. Haulage Ltd.*, *supra* that if a director on behalf of his company conspires with another, the director, the company, and third person may together be convicted of conspiracy." It is submitted that Stable J. did not decide the question. See also *supra*, note 63.

83. The English Law Commission, Working Paper No. 50, Codification of the Criminal Law, *General Principles, Inchoate Offences, Conspiracy, Attempt, and Incitement*, *supra*, note 4, at para. 34 n. 42.

84. *Supra*, note 44, at 245. McDonald, "Criminality and the Canadian Anti-Combines Laws" (1965), 4 Alb. L. R. 67 at 78, restricts *Electrical Contractors* to cases where the officer acts in more than one capacity, but regards prosecution on this basis as unlikely. See also Stengel, *supra*, note 56 and *U.S. v. Wise* (1962), 370 U.S. 405.

more than one legal capacity, it follows, as a pure matter of logic, that the crime of conspiracy may reach any company employing the accused, so long as he acts within the scope of his authority, since there will always be imputation and thus always agreement.⁸⁵ In the world of reality, however, it may be inappropriate to sanction a company for whom the director acts, since the result of dual legal capacity would be akin to strict vicarious responsibility.

Further, the authority cited by the court is unconvincing. Apart from *I.C.R. Haulage*, the court cited *R. v. Martin*,⁸⁶ but if that case had accepted dual legal capacity, it would have been decided differently. The court also relied on *dicta* from *O'Brien v. Dawson*,⁸⁷ but that was a civil action for inducement of breach of contract and not a criminal prosecution for conspiracy. Further, although Starke J. did distinguish between the legal capacities of a company director, he did so to *absolve* the company from liability.

In reality, one person had broken the law in *Electrical Contractors*, but his activities were cloaked behind a corporate veil.⁸⁸ Having lifted the corporate veil, the correct approach would be to apply the criminal sanction to the individual, rather than to recognize a corporate veil by separating man from company and thus confuse the issue. It is no answer to suggest that anti-combine legislation is or may be framed only in terms of conspiracy and no alternative count was possible in this case. Many of the activities constituting corporate crime may be attacked through statutory

85. See *Union Pacific Coal Co. v. U.S.* *supra*, note 50, at 745, (U.S.C.A., Eighth Circuit):

“...the distinction between the commission of an offense and a combination to commit it by a corporation vanishes . . . every time an agent commits an offense within the scope of his authority under this theory, the corporation necessarily conspires with him to commit it.”

86. *Supra*, note 51, at 441, (Man. C. A.). Quoted (1961), 27 D.L.R. (2d) 193 at 201.

87. (1942), 66 C.L.R. 18 at 32, (H. C. Aust.), *per* Starke J., quoted *id.*, at 201:

“The company, if it were guilty of a breach of its contracts in this case, acted through its director the respondent Doyle, but it is neither “law nor sense” to say that Doyle in the exercise of his functions as a director of the company combined with it to do any unlawful acts or become a joint tortfeasor. . . . The acts of Doyle were the acts of the company and not his personal acts which involved him in any liability to the plaintiff. But I would add that it does not follow that a director of a company would escape personal liability under cover of the company’s responsibility if he himself became an actor.”

88. In U.S. law, *Electrical Contractors* would have been decided differently. See *U.S. v. Santa Rita Store Co.* (1911), 113 P. 620, (New Mex.).

provisions which apply directly to the corporation and its officers.⁸⁹ If the company cannot be properly held guilty of conspiracy, it is not up to the courts by fiction to fill gaps or remedy bad or inadequate legislation.⁹⁰ On the contrary, penal statutes should be strictly construed.⁹¹

(D) *The American Approach*

It is important to stress again that American law does not appear to adopt the Anglo-Canadian distinction between employees and directors.⁹² There is considerable authority for the view that the *mens rea* of any corporate official acting within the scope of his employment may be imputed to the company.⁹³

89. Most Criminal Code offences, for example, are directed toward individuals or companies, or both, explicitly. See The Criminal Code, R.S.C. 1970, c. C-34, s.2(1), where the definition of "everyone" includes bodies corporate. The English solution is a provision which reads:

"Where an offence . . . committed by a body corporate is proved to have been committed with the consent or connivance of, any director, manager, secretary, or other similar officer of the body corporate or any person who was purporting to act in any such capacity, he as well as the body corporate shall be guilty of that offence, and shall be liable to be proceeded against and punished accordingly."

See, for example, Building Control Act U.K., 1966, c.27, section 9(5); Industrial Development Act, U.K., 1966, c.34, section 10; Sea Fisheries Regulations Act, U.K., 1966 c.38, section 11(6). The need for *Electrical Contractor's* fictions is obviated.

90. An examination of United States antitrust law showed that it was always possible to convict accused without resorting to the conspiracy offence. See Comment, "Intra-Enterprise Conspiracy under the Sherman Act" (1953-54), 63 Yale L. J. 372 at 388.

91. Glanville Williams, *Criminal Law: The General Part*, *supra*, note 1, at 217; *R. v. Singer* (1931), 56 C.C.C. 68 at 71, (Ont. H. C.); *R. v. Container Materials Ltd.* (1940), 74 C.C.C. 113 at 127, (Ont. S. C.); *R. v. Imperial Tobacco Co.* (1942), 77 C.C.C. 146 at 150-1, (Alta. C. A.); *Winnipeg Film Society v. The Queen* (1964), 44 D.L.R. (2d) 126, (S.C.C.); *R. v. McDonnell*, *supra*, note 44, at 240.

92. See the authority cited by Fisse, *supra*, note 15, at 203 n. 5. This results in a confusion between the identification theory and vicarious liability. See Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5, at 36 and 38, and Mueller, "Mens Rea and the Corporation" (1957-8), 19 U. Pitt. L. R. 21 at 41-2. The confusion is unhappily demonstrated in Note, "Criminal Liability of Corporations For Acts of Their Agents" (1946), 60 H.L.R. 283, where the author cites English identification theory cases as examples of vicarious liability.

93. *Working Papers of the National Commission on Reform of Federal Criminal Laws*, *supra*, note 17, Volume 1 at 170, and the authority cited therein, and the English Law Commission, Working Paper No. 44, *Codification of The Criminal Law, General Principles, Criminal Liability of Corporations*, *supra*, note 5, at para. 11. For strong criticism of this law, see Mueller, *supra*, note 92.

Two early cases may be cited for the view that a company may conspire with its agents: *Patterson v. United States*,⁹⁴ and *White Bear Theatre Corp. v. State Theatre Corp.*⁹⁵ The philosophy behind these cases and the point of view which they represent was stated by Kramer as follows: “. . . the legal fiction by which the acts of officers are merged into the corporation may not be used to defeat the public policy of the laws prohibiting conspiracies to commit crimes.”⁹⁶

The bulk of authority is against the approach espoused by Kramer. The leading decision is *Nelson Radio and Supply Co. Inc. v. Motorola Inc.*,⁹⁷ in which an antitrust conspiracy was alleged between a company, its president, its sales manager, and employees who “have been actively engaged in the management, direction, and control of affairs and business” of the company.⁹⁸ The court proceeded upon common-law principles⁹⁹ and held: “. . . it appears plain to us that the conspiracy upon which the plaintiff relies consists simply in the absurd assertion that the defendant, through its officers and agents, conspired with itself to restrain its trade in its own products.”¹⁰⁰ Nelson has since been applied a number of times, including in the case of *Poller v. Columbia Broadcasting System Inc.* in which it was held that: “Poller’s charge . . . is in reality a charge that C.B.S. conspired with itself . . .

94. (1915), 222 F. 599, (Sixth Circuit). See Barndt, “Two Trees or One? — The Problem of Intra-Enterprise Conspiracy” (1961-1962), 23 Mont. L. R. 158 at 162.

95. (1942), 129 F. 2d 600, (Eighth Circuit). See also *Arthur v. Kraft-Phoenix Cheese Corp.* (1938), 26 F. Supp. 824. (D. C. Md.), and *Times-Picayune Publishing Co. v. U.S.* (1953), 345 U.S. 594.

96. Kramer, “Does Concerted Action Solely Between a Corporation and Its Officers Acting on Its Behalf in Unreasonable Restraint of Interstate Commerce Violate Section 1 of the Sherman Act?” (1950), 11 Fed. B. J. 130 at 131-2. See also Lee, “Corporate Criminal Liability” (1928), 28 Col. L. R. 1 at 9; Hall, “The Substantive Law of Crimes 1887-1936” (1937), 50 H. L.R. 616 at 648. Other cases which agree with Kramer’s point of view are: *Standard Oil v. State supra*, note 61; *Minnisohn v. U.S.*, *supra*, note 74; *Egan v. U.S.* (1943), 137 F. 2d 369, (U.S.C.A., Eighth Circuit).

97. *Supra*, note 56.

98. *Id.*, at 914.

99. See Note, “Developments in The Law: Criminal Conspiracy”, *supra*, note 1, at 1003 n. 631.

100. *Supra*, note 56 at 914. The dissentient argued:

“It seems to me that whether the functions are performed by separate corporations or by a single entity is purely a matter of convenience to be exercised under state law and that the incidence and effect of the federal antitrust laws should be the same no matter what form the transactions take.”

Id., at 916.

We conclude that C.B.S., its unincorporated division, and its employees were incapable of conspiring to restrain trade and commerce.”¹⁰¹

These cases, and others like them, may be approached in two ways. Firstly, they can be approached as cases which refuse to find necessary plurality in cases where companies are charged with conspiring with their agents because of the imputation of *mens rea* to the company. *Poller's* case, for example, was decided on this ground. Secondly, however, *Nelson* may be explained as holding that the executive directors, as a group, cannot conspire with the company. After all, the members of the executive, collectively, charged in *Nelson* were the whole company and, in a very real sense, it could be said that the charge amounted to conspiring with oneself.

This narrow interpretation of *Nelson* has not been recognized as an option, but, where conspiracy is alleged between the body of men who control the company and the company itself, an analogy to the *McDonnell* one man company becomes apparent. However, whether one adopts one view or the other, weakness in the use of conspiracy against a company is revealed. On the wide view, there can be no conspiracy due to imputation, but the matter may be remedied by omitting the company from the indictment and charging the individual directors with conspiring with each other. While the narrow view has a different rationale, the same result and remedy follow. Thus, it is plain that there are severe conceptual difficulties in charging a company with conspiracy.

(5) The Objective Element (3): Vertical Integration and “Single Corporate Form”

(A) Dominion Steel and Coal, And Some General Issues

In this section, it is intended to deal with the case where it is alleged that a company has conspired with a subsidiary company, partly or wholly owned by it.¹⁰² The problem rests in the fact of control. Can it be truly said that where the same group of directors control two

101. (1960), 284 F. 2d 599, at 603, (U.S.C.A., D.C. Circuit).

102. The word “subsidiary” and its definition will be central to this section, and will be used, until defined in the text, to mean any company with significant ties to another in a subordinate sense, until that time. See Woods, *supra*, note 43, at 1181, and Barndt, *supra*, note 94, at 188.

companies, that these companies can conspire with each other? In *McDonnell*,¹⁰³ the individual defendant owned and controlled two companies, but was charged with conspiring with each. Could the Crown have prosecuted both of his companies for conspiring with each other?

In 1969, Leigh was unable to find a decided English case on the subject,¹⁰⁴ and only one Canadian case, *R. v. Dominion Steel and Coal Corporation*.¹⁰⁵ In that case, conspiracy was alleged between several companies, one of which was a wholly owned subsidiary of another conspirator. Judson J. held:

Perhaps I should say a word about the position of Canadian Steel. Canadian Steel came into the agreement when it became a subsidiary of Dosco. It was submitted that I could not make any finding of guilt against this company because it had no independent volition of its own, that it acted under the express direction of Dosco in Montreal.

This is a limited company. It is true that it is a wholly owned subsidiary of Dosco, but it had its own officials; it had its own representatives at the meetings I have mentioned; it played an important part in the industry.

I can see no basis for excusing a subsidiary because it acts under the control of its parent company. It was not part of the agreement at its inception. It came into the agreement when it got into the industry and took an active part in the agreement.¹⁰⁶

This judgment is ambiguous. The thrust of the second paragraph appears to be that His Lordship will find Canadian Steel guilty, despite its wholly owned status, because it had its own officials, representatives, and played an important, and presumably separate, role in the industry. However, the concluding paragraph goes back on much of this. First, it begs the question by stating that “*it came*” and “*it took*”. Secondly, having established in the preceeding paragraph factors which may make the subsidiary a separate legal person from its parent, the concluding paragraph admits that the subsidiary was under the control of the parent company. Further,

103. *Supra*, note 44.

104. Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5, at 56.

105. (1956), 116 C.C.C. 117, (Ont. H. C.).

106. *Id.*, at 134-5. Leigh, *supra*, note 104, says of the case:

“Provided that each has a separate organization and its own management, there would appear to be no difficulty in holding that such corporations could conspire together, and that for the most part is the clear result in the United States and Canada.”

It is submitted that the result, even the problem, is far from clear.”

the sweeping terms of the concluding paragraph, taken in isolation, would lead to the conclusion that, in any case, a company can conspire with its wholly owned subsidiary. It is submitted that the general statements in the final paragraph must be limited by what preceded them.

Judson J. states that a factor in deciding the "separateness" of the subsidiary for the purposes of the parties requirement of conspiracy is the fact that the subsidiary has separate officials. This must, however, depend on the facts of the case. A subsidiary company must have office bearers and directors or it is not a subsidiary company. It is submitted that the real tests must be who pays the office bearers and where their orders ultimately come from.¹⁰⁷ Otherwise, "separateness" would depend entirely upon the effect of the corporate veil. It is begging the question to argue that the subsidiary is separately incorporated and it therefore a separate "person". If the courts fail to look behind the corporate veil to the *reality of* control, then mere conveniences of bookkeeping or office management, open to manipulation, may be determinative of "separateness". Once the court has pierced the corporate veil to see who owns the shares of the subsidiary, it should not be content to accept appearances at face value.¹⁰⁸

The fact that Canadian Steel "played an important part in the industry" is also question begging. The question is whether it was the subsidiary which did so or the parent company using the subsidiary as a convenient tool. However, appearances may be important for another reason. Some American courts have indicated that, in antitrust cases at least, the question whether the subsidiary and the parent have created the appearance of competition may sway the court into holding that they are in fact separate.¹⁰⁹ This may rest not so much upon the concept of poetic justice, as, perhaps, that the parent is estopped thereby from pleading "single

107. This really comes back to "control". See Leigh, *ibid.* and the discussion which follows.

108. See, for a general discussion on the attitude and history of Anglo Canadian law with respect to this question: Woods, *supra*, note 43.

109. See, for example, *Kiefer Stewart Co. v. Seagram & Sons* (1951), 340 U.S. 211 at 215, and the rejection of this by Stengel, *supra*, note 56, at 22, and by McQuade, "Conspiracy, Multi-Corporate Enterprises and Section 1 of The Sherman Act" (1955), 41 Va. L. R. 183 at 213: "Besides being the wrong way to enforce a policy of separating the separable, this doctrine is certainly a difficult way."

corporate form",¹¹⁰ or because the steps taken to achieve the appearance of separateness, achieve the reality as well.¹¹¹

The factor of separate representation at the conspiratorial agreement, mentioned by Judson J., *may* be important, but it should not obscure reality. It should be noted that this too is open to manipulation and is not necessarily a true measurement of the subsidiary's separation.

A consideration of the subsidiary shareholding may be a useful aid in deciding the question of separateness. Although Mueller has suggested that corporate criminal responsibility has grown up with no rationale at all,¹¹² he also suggests that a basic rationale for its existence is to reach and sanction the shareholders of the company.¹¹³ Whether this be true or not, it may help decide the problem before us. First, if the court looked to the shareholding of the subsidiary, it would be able to see how great a control the parent company actually had over the policy and actions of the subsidiary. Compare a parent holding of 51% with one of 98%.¹¹⁴ Secondly, if the aim of the imposition of the criminal sanction is to reach the pockets of the shareholders, a knowledge of shareholdings could

110. For an analogous view, see *Wood v. U.S.*, *supra*, note 59, at 57.

111. For example, where companies decide to evade tax or anticompetitive restrictions, the steps taken may involve a separate legal entity for conspiracy purposes.

112. Mueller, *supra*, note 92, at 23:

"It is safe to say that, for the most part, the law has proceeded without rationale whatsoever It simply rests on an assumption that such liability is a necessary and useful thing."

Leigh, *supra*, note 154, concludes that if there is any rationale, it is certainly hard to find, (Ch. 8 and at page 43) and that there is no good reason why corporate criminal liability should not be abolished (at 185).

113. *Id.*, at 39 ff. This is also recognized by Leigh, *supra*, note 154, at 143 ff. For other justifications, see Leigh, *id.*, at 150 ff., and Fisse, "Consumer Protection And Corporate Criminal Responsibility", *supra*, note 10. See also the discussions in the *Working Papers of the National Commission on Reform of Federal Criminal Laws*, *supra*, note 17, volume 1 at 188-190; English Law Commission, Working Paper No. 44, *Codification of the Criminal Law, General Principles, Criminal Liability of Corporations*, *supra*, note 5, at paras. 46-7; Note, "Developments in the Law: Criminal Conspiracy", *supra*, note 1, at 1001.

114. See *Timken Roller Bearing Co. v. U.S.* (1951), 341 U.S. 593. McQuade, *supra*, note 109, at 212-3 distinguishes between control by ownership, and control by agreement based on percentage of shareholding. *Timken* is an example of control by agreement: Krause, "The Multi-Corporate International Business under Section 1 of The Sherman Act — Intra-Enterprise Conspiracy Revisited" (1962), 17 Bus. Law. 912 at 930-932, 935.

assist in a decision as to the effectiveness of the imposition of any sanction.¹¹⁵

If one accepts that the notion of control becomes determinative, then the utility of looking to shareholdings may be illustrated by *S. Berendson Ltd. v. Inland Revenue Commissioners*.¹¹⁶ In that case, X Co. had an issued capital of 1000 shares which each carried one vote. The directors held 410 shares and a Danish company held 590 shares. The question was whether the directors of X Co. had a "controlling interest" in X Co. It was proved that Y, a director of X Co., held a majority of shares in the Danish company. The Court of Appeal held that it could look to the share registers of both companies to decide the question of control. In *Unit Construction Co. Ltd. v. Bullock*,¹¹⁷ the question was where a company was resident. The House of Lords ignored the articles of association, the place of incorporation, and legal form and looked to where the management *really* took place.

It must be emphasised that the factors looked to must reflect reality. Appearances are open to evasive action. If it be held lightly that a company may conspire with its subsidiaries, then the parent may easily reorganize as a departmental structure. *Poller v. C.B.S.*¹¹⁸ holds that, in America at least, a company cannot conspire with its own unincorporated subdivisions. Consistent piercing of the corporate veil will hamper evasion by means of corporate reorganization. Note also, that the tendency in such cases as *McDonnell*¹¹⁹ has been to look to reality. If the subsidiary is *in fact* under the thumb of its parent, then its illegal policies or actions will be dictated by that company. Corporate decision making in such cases is "a joint deliberative and consultative process"¹²⁰ and should be recognized as such.

115. See Krause, *id.*, at 930-932, and the cases there cited: *U.S. v. Pan American World Airways Inc.* (1961), 193 F. Supp. 18, (S.D.N.Y.); *American T. C. P. Corp. v. Shell Oil Co.* (1955), 127 F. Supp. 208, (S.D.N.Y.).

116. [1958] Ch. 1, (C.A.).

117. [1960] A.C. 351. See also Woods, *supra*, note 43, and the English cases cited above, note 48.

118. *supra*, note, 101. The case was reversed but not on conspiracy. (1962), 368 U.S. 464 at 469 n.4:

"We do not pass upon the point urged by Poller that under C.B.S. corporate arrangement of divisions, with separate officers and autonomy in each, the divisions came within the rule as to corporate subsidiaries."

119. *Supra*, note 44.

120. Leigh, *The Criminal Liability of Corporations in English Law*, *supra*, note 5, at 56, citing Berle, "The Theory of Enterprise Entity" (1947), 47 Col.L.R. 343.

(B) Other Canadian Anti-Combine Cases

While *Dominion Coal and Steel*¹²¹ remains the sole judicial discussion in Canada of the problem of inter-corporate conspiracy, two other cases may be cited as examples of the problem, in which lack of plurality was either not argued or dismissed out of hand.

In *R. v. Container Materials Ltd.*,¹²² a number of companies were charged with conspiracy in restraint of trade. Several companies in the paper carton manufacturing industry, decided to form a company which would have power to regulate and control all their business in Canada, and Container Materials Ltd. was a company revived by the conspirators for this purpose. All the conspirators held between them all the shares of the company in proportion to the amount of business done in Canada and all were represented on the board. The president of Container Materials Ltd. was the only person not a director of another company.¹²³ Although the point was not dealt with, how can it be said that Container Materials Ltd. conspired with the holding companies? How could it be said to have any real existence separate from that of its parent companies?

In *R. v. Eddy Match Co. Ltd.*,¹²⁴ the Eddy Match Company set out to monopolize the Canadian match market. The parties to the alleged combine eventually charged were: Commonwealth Match Co., Canada Match Co., Valcourt Co. Ltd., all wholly owned subsidiaries of Eddy Match Co., and Federal Match Co., a wholly owned subsidiary of Valcourt Co. Ltd. It is unclear from the case whether it was necessary to establish two or more parties to constitute the offence but the court did imply that it regarded these companies as separate persons.¹²⁵ To hold that these companies were separate would be to completely ignore reality and, if the

121. *Supra*, note 105.

122. The facts discussed are taken from (1940), 74 C.C.C. 113, (Ont. S.C.). See also the reports of the case as it was appealed: (1939), 72 C.C.C. 383, (Ont. S.C.); (1941), 76 C.C.C. 18, (Ont. C.A.); (1942), 77 C.C.C. 129, (S.C.C.).

123. *Id.*, at 135.

124. (1951-2), 13 C.R. 217, 268, (Que. K.B.). See also *R. v. McGavin Bakeries* [1950] 2 W.W.R. 735 at 749, (B.C.S.C.).

125. *Id.*, at 218 — charged with being “parties” to the combine; *id.*, at 287 — referred to as “various persons”. The question of whether plurality was required is unclear; *id.*, at 288:

“Thus, the legislature has willed that no person, neither corporation nor individual, may with impunity, participate or assist in formation or operation of an illegal combine”

charge was conspiracy, it is submitted that no plurality could be established between the companies.

The problem in all these cases is that the closer the company comes to achieving a perfect combine or monopoly, the closer it comes to being immune from a conspiracy charge as other possible co-conspirators are eliminated. This emphasizes the lack of utility in the conspiracy concept in the anti-combine field.

(C) *A Note on American Anti-Trust*

A number of American cases in the anti-trust area have raised, but certainly not answered, the problem of inter-corporate conspiracy. In a succession of prosecutions under the Sherman Act, parent and subsidiary companies have been charged with conspiring with each other.¹²⁶ However, while these cases on their face appear to hold that a company may, under the Sherman Act, conspire with its wholly owned subsidiary,¹²⁷ most commentators argue that the decisions are either wrong or irrelevant.¹²⁸ It is impossible to glean from these cases and the academic discussion prompted by them any rational view as to whether a company can conspire with its owned

126. *U.S. v. General Motors Corp.* (1941), 121 F.2d. 376, (C.C.A., Seventh Circuit), noted in (1942), 30 Calif.L.R. 204, (1942), 10 Geo.Wash.L.R. 882, (1942), 17 Ind.L.J. 255, (1942), 21 N.C.L.R. 1 (1943), 27 Mar.L.R. 158; *U.S. v. Yellow Cab Co.* (1947), 332 U.S. 218, noted in (1948), 32 Minn. L.R. 521; *U.S. v. Columbia Steel Co.* (1948), 334 U.S. 495; *Kiefer Stewart Co. v. Seagram & Sons* (1951), *supra*, note 109, noted in (1951), 50 Col.L.R. 1144; *Timken Roller Bearing Co. v. U.S.*, *supra*, note 114, noted in (1952), 100 U.Pa.L.R. 1006; *Sunkist Growers Inc. v. Winckler and Smith Citrus Products Co.* (1961), 370 U.S. 19. The literature is quite immense. Useful references are: Kramer, *supra*, note 96, Rahl, *supra*, note 3; Note, "The Sherman Act and Multi-Corporate Single Traders: Competition Among Affiliates" (1952), 100 U.Pa.L.R. 1006; Comment, "Intra-Enterprise Conspiracy under The Sherman Act", *supra*, note 90; Note, "The Nature of a Sherman Act Conspiracy" (1954), 54 Col.L.R. 1108; McQuade, *supra*, note 109, Note, "Recent Developments in the Law: Criminal Conspiracy" *supra*, note 1, at 1000 ff.; Barndt, *supra*, note 94, Krause, *supra*, note 114, Stengel, *supra*, note 56.

127. There are numerous *dicta* to this effect in the cases cited *ibid.* These *dicta* are quoted and extensively discussed in the literature surrounding this area.

128. Thus, for example, McQuade, *id.*, at 212 states:

"An attempt either to classify these eight cases or to theorize about an intra enterprise conspiracy doctrine suggested by them is not very rewarding" Stengel, *ibid.*, among others, concludes that the cases and commentators are so ambiguous and confusing, that the question should be decided afresh. At 22 ff., he rejects as useless or meaningless, the tests proposed or discussed by authority. The wide agreement among the authority cited *ibid.*, makes the American experience, of only marginal relevance, totally useless, except as discussed below.

or controlled subsidiaries.¹²⁹ This has possibly been due to the Sherman Act itself although that Act employs the concept of conspiracy.¹³⁰

What does emerge from a long, complex, and most unhelpful discussion, is the view that the rules of inter-corporate conspiracy may necessarily be affected by the rules that govern the possible existence of conspiracy between a company and its directors.¹³¹ This turns on the notion of evasion. If it be held that a company may not conspire with its directors, as Anglo-Canadian law does, then a holding that a company may properly be held to conspire with its subsidiaries would lead to evasion by corporate reorganization. Instead of using subsidiaries, a company could organize into unincorporated subdivisions. Ease of evasion would render the rule unusable.^{131a}

If it be held that a company cannot conspire with its wholly owned subsidiaries but may conspire with a company over which it does not hold total control (whatever that may mean), then evasion

129 *Ibid.* See, for example, Comment, "Intra-Enterprise Conspiracy Under the Sherman Act", *Supra.* note 90 at 388, where it is argued that the defence of "single corporate form" does not relate to conspiracy *at all*, but to the effects of the monopoly charged.

130. See Note, "Developments in the Law: Criminal Conspiracy", *supra*, note 1 at 1002-3.

131. This emerges particularly from Kramer, *supra*, note 96, and Rahl, *supra*, note 3. See also Note, *id.*, at 1001: "It seems, however, that even though closely related corporations should not be considered separate entities in determining the existence of a conspiracy, the Courts' actions do not offend the requirement that there be two parties. Under common-law principles it seems that there may be a conspiracy among officers and agents of one corporation, acting within the scope of their authority, and that a penalty may properly be assessed against the corporation for such a conspiracy." See also *id.*, at 1003. Compare Stengel, *supra*, note 56, who concludes that a company cannot conspire with its agents, (6-8) and also that a company cannot conspire with its subsidiaries. See also Note, "The Sherman Act and Multi-Corporate Single Traders: Competition Among Affiliates", *supra*, note 121 at 1011: "The inter-corporate conspiracy doctrine is therefore well settled while the intra-corporate doctrine is still doubtful for lack of clear precedent. Because of the logical and factual relation between them perhaps consistency would demand they coincide, so that a conspiracy might be found as readily within a single corporation as it is among affiliated corporations."

And Barndt, *supra*, note 94 at 198-9.

At 198: "Thus, whether an enterprise is operated as a simple corporation, as a corporate family, or as a corporation with branches, the result should be the same in all events other than where a single officer is acting."

131a. This argument is made by Rahl, *supra*, note 3 at 765:

"The corporate family might first try evasion by abandoning separate entities. This development in turn would invite the finding of conspiracy between the single corporation and one or more of its officers and directors."

would not be so easy since in order to attract the defence that the company conspired with itself there would have to be a close relation between the subsidiaries' "directors" and the parents' "directors" to equate the two. This would still be so if the subsidiary was dissolved and its functions absorbed into the parent. In other words, evasion is easier the more control the parent has over the subsidiary.

(D) Conclusion

It is submitted that as a general rule, there can be no conspiracy between a parent company and its subsidiary, and, as a corollary, between a subsidiary and a subsidiary. The question for the courts is: when is a subsidiary a subsidiary? It is submitted that the correct approach is to begin with the Anglo-Canadian rule that a company cannot conspire with its directors, and then ask: when does a company become analagous to a director? It is submitted that the question may be answered in the same way in both cases: by means of the accepted "brains and nerve centre" test.

Where the parent company nominates or shares directors for the subsidiary company or has a majority vote or shareholding, then it is submitted that the "brains and nerve centre" of the subsidiary are the same as those of the parent. Control must be regarded as vital since a subsidiary and parent need not have an interlocking directorate for the latter to dictate the policy and actions of the former. The factors discussed above may be helpful in deciding whether the "brain and nerve centre" of the subsidiary is the parent. There is no easy evasion of this test, which also leads to consistent law.

The basis of the suggested test is that there is no real difference, in the context of the requirement of plurality in conspiracy, between a director of the company and a wholly owned subsidiary. The *reason* for defining each is, however different. In the case of the director, the plurality requirement is a problem, because his intent is imputed to the company. In the case of the subsidiary, the plurality requirement is a problem because the parent's intent is imputed to the subsidiary, since, in reality, only one decision is made. But, just as there is difficulty in deciding whether an employee is a director the further down the corporate hierarchy one moves, there is a similar difficulty the closer aligned one company is to another. The peculiar nature of the Sherman Act colours the American discussion

of intercorporate conspiracy and thus renders all but basic conceptual approaches to the problem irrelevant. In the Anglo-Canadian context, the law has yet to decide if there is a problem and, if so, how to deal with it. It has been the aim of the preceding discussion to suggest an answer.

(6) *Conclusions*

While the subjective element of conspiracy raises problems where conspiracy is charged against a company, it has been seen that the law on the topic is, at base, well settled, although the application of the law to the particular case may raise problems with respect to a charge of any offence. However, the objective element, the requisite plurality, is barely recognized as a problem in some areas and it is upon the objective element that the discussion has centered. It is proposed in this conclusion to look at the application of the crime of conspiracy to the company, as to the objective element, in general terms: first, in light of the rationales of the crime of conspiracy, and secondly, to evaluate the utility of the crime as applied to the company.

The dual rationales of the crime of conspiracy may be summarized thus: (a) *The attempt rationale*: when persons conspire to commit an unlawful act, they are, in essence, about to attempt the commission of that unlawful act. Where the unlawful act is a crime, the crime of conspiracy may be seen as an adjunct to the crime of attempt, as it reaches out to punish and deter conduct preparatory to the commission of a crime.¹³² (b) *The social danger rationale*: when persons agree together to commit an unlawful act, then they represent a significant danger to society for reasons of mutual encouragement, weight of numbers and so on. This may make the commission of a specific crime more likely or may make the commission of any crime more likely. Thus, on this rationale, the object of conspiracy need not be criminal to attract legal sanction.¹³³

132. See Wright, *The Law of Criminal Conspiracies and Agreements*, *supra*, note 1 at 68; Smith and Hogan, *Criminal Law* (London: Butterworths, 2nd ed., 1969) at 271; *Commentary on the Model Penal Code, Tentative Draft No. 10*, (1960), at 96-7; *Working Papers of the National Commission on Reform of Federal Criminal Laws*, *supra*, note 17, Volume 1, at 381; Note, "Developments in the Law: Criminal Conspiracy" *supra*, note 1 at 924-5.

133. Wright, *id.*, at 68; Model Penal Code, *id.*, at 98-99; The English Criminal Law Commission, Seventh Report, (London: H.M.S.O., 1843) at 90; Holdsworth,

The social danger rationale has been vigorously and cogently attacked and has lost much of its credibility.¹³⁴ However, it is a mistake to assume that the rationales are quite distinct and that the attempt rationale remains intact. The two rationales merge into a general assertion that an agreement to commit a crime poses a danger to society. A basic reason for the punishing of attempts lies in the danger to society created by the attempt since the actor is held to be sufficiently proximate that his actions will result, or are likely to result, in socially harmful consequences.¹³⁵ Conspiracy reaches back further into preparation than does attempt. The basis for this must rest upon the fact that agreement makes conduct, insufficient to constitute attempt, socially dangerous.¹³⁶ It has been observed that the attempt rationale focuses upon the social danger posed by the object of the conspiracy, whereas the social danger rationale looks to the increased criminal power inherent in a combination.¹³⁷ However, it is proposed to examine the situations discussed above in light of the concept of social danger on the assumption that it is the true basis of the crime of conspiracy.

As we have seen, the law denies that a company may conspire with one director. It is submitted that this is the correct result. Where the conduct of the director is yet insufficient to constitute an attempt, no additional danger is present due to his status as a director. This is particularly obvious in "one man company" cases. The company is only a tool or weapon to help effect the criminal

"Conspiracy and Abuse of Legal Process" (1921), 37 L.Q.R. 462 at 467; Note, (1948), 62 H.L.R. at 283; Note, *id.*, at 924; Goodhart, "The *Shaw* Case: The Law and Public Morals" (1961), 77 L.Q.R. 560 at 564. The rationale can be the only explanation of *Shaw v. D.P.P.* [1961] 2 All E.R. 446, (H.L.); *Knulier v. D.P.P.* [1972] 2 All E.R. 898, (H.L.), since no crime was ever contemplated or attempted. 134. Glanville Williams, *Criminal Law: The General Part*, *supra*, note 1, at 711; Sayre, "Criminal Conspiracy" (1922), 35 H.L.R. 393 at 409-411, 427.

135. See Note, "Developments in The Law: Criminal Conspiracy" *supra*, note 1, at 922. Hence the dangerous proximity rule in attempt: *Hyde v. U.S.* (1912), 225 U.S. 347 at 388 (dissent), *per* Holmes J. See also *Commonwealth v. Kennedy* (1897), 170 Mass. 18, 48 N.E. 770.

136. Note, *id.*, at 924:

"... as action toward a criminal end nears execution, a point is reached at which the increasing risk to society is thought to outweigh the diminishing likelihood of a change of heart or of a misreading of intent, and at this point mere "preparation" becomes punishable as "attempt". When the defendant has chosen to act in concert with others, rather than to act alone, the point of justifiable intervention is reached at an earlier stage."

137. *Id.*, at 924-5 called the "specific object" and "general danger" rationales respectively.

intent. Thus: “. . . a single person is not punishable for intending to perform an act merely because he has at hand to effect his intent means which can cause greater harm than could be produced were these means lacking.”¹³⁸ A similar reasoning applies to invalidate the conviction in *Electrical Contractors*.

Where conspiracy is alleged between a company and two or more of its directors, an argument may be made either way. On the one hand, it could be argued that the real addition is one human mind and the danger is a result of the combination of two human minds, while the company remains a tool. Thus, there should be conspiracy only as between two directors. If such reasoning applies throughout the area, then the criminal sanction of conspiracy should rarely be applied to the company. On the other hand, it could be argued that the company should be responsible; it is involved, although by fiction, and that since the company in fact adds power to the criminal plot, it should at least be a permissible co-conspirator.¹³⁹

It is submitted that the rationale only extends to human actors, and that it is a rare case when the addition of the company can be justified under it. Such a case may be where another director is unindictable for some reason and the company becomes involved through the person of that director. Even in such a case, the rationale is weak. Thus, since mutual encouragement and the other components of social danger are directed toward human actors, the conspiracy rationale is hard to apply to an artificial legal person.

It was suggested above that a parent company may conspire with a subsidiary company only where the “brains and nerve centre” of the subsidiary are *different* from those of the parent. In such a case, the rationale justifies the rule since, in that case, a plurality of human actors is present as represented by their respective companies. Where overlap is partial, the rationale will also be partial and will depend upon an individual assessment of increased social danger.

It is submitted that a definite pattern emerges from the consideration of the applicability of the rationale or rationales of

138. *Id.*, at 952. The author continued:

“The corporation seems an inanimate object analogous to a bank or a trust. Plurality in the context of conspiracy should be viewed as a plurality of human minds, each of which is able to contribute consciously to the furtherance of the conspiracy. This reasoning applies equally well under the general danger rationale.”

139. So argued by Kramer, *supra*, note 96 at 131, and Note *id.*, at 953.

criminal conspiracy in relation to corporate crime. The rationale focuses on individuals for the basic reason that it was designed to apply to individuals.¹⁴⁰ It was not designed and developed to apply to a company. The technical and conceptual difficulties that emerge arise from the same cause. Thus, McDonald has commented: "This paper has attempted to indicate how the traditional concepts of the criminal law have been strained in the attempt to adapt them to twentieth century commerce and forms of business organization."¹⁴¹ Thus also, McQuade observed in the context of American anti-trust: "Attempting to solve the problem with fictional conspiracies will only create new headaches."¹⁴² The technical and conceptual difficulties which arise when a company is charged with conspiracy arise because the law of conspiracy was developed for individuals. This is evidenced by the fact that the rationales for the crime focus upon individual human actors. The problem is not helped by a demonstrable uncertainty whether companies should be subject to criminal responsibility and if so, to what extent.¹⁴³

It is therefore submitted that conspiracy should not be invoked against the company, but prosecutors should rather reach to apply criminal sanctions to the individual actors, by conspiracy or substantive criminal law. A commentator has observed: "A perhaps more realistic approach would treat intra-corporate conspiracy as involving an agreement among the individuals in charge who use the corporations as instrumentalities for unlawful conduct."¹⁴⁴ Then,

140 This is clear from the history of the crime, which predates the modern company by seven hundred years. The point is reinforced by Mueller, *supra*, note 92 at 36:

"The common law is a creation by individuals for individuals. Organized aggregations of private individuals had little influence on its makeup. They were neither subjects, nor objects of the law to any material extent. In fact, when centuries after the incept the private body corporate made its appearance on the scene, the machinery of the common law was perplexed."

141. McDonald, *supra*, note 84 at 92.

142. McQuade, *supra*, note 109 at 215. Similar points are made in U.S. literature by Rahl, *supra*, note 3: Comment, "Intra-Enterprise Conspiracy under the Sherman Act *supra*, note 90 at 388; Stengel, *supra*, note 56.

143. Leigh, for example, says "No convincing case can be made out for the retention of corporate criminal liability as a general principle of criminal law". (*supra*, note 5) at 185. For a contrary view, see The English Law Commission, Working Paper No. 44, *Codification of the Criminal Law, General Principles, Criminal Liability of Corporations*, *supra*, notes, at para. 24; Andrews, *supra*, note 3 at 95 ff. See also *supra*, notes 112-113.

144. Note, "The Nature of a Sherman Act Conspiracy", *supra*, note 126 at 1125. For similar views, see Leigh, *id.*, at 185-6, and Andrews, *id.*, at 94. "That part of

and only then, would difficult conceptual and technical problems be "relegated to the attention of history."¹⁴⁵ It is therefore recommended that concerted corporate illegality should be attacked, if at all, by applying the criminal sanction to the human actors or by using the substantive criminal law against the company.¹⁴⁶ Conceivably, the ingenuity of man may devise a combined action offence in particular statutes designed to by-pass the word "conspiracy" and the problems it conjures.

the criminal law which is dependent on a concept of delinquency was not fashioned for corporate bodies."

145. Leigh, *supra*, note 5, at 186.

146. See Krause, *supra*, note 114, at 929 n. 77:

"Might it not be argued that the real shortcoming of Section 1 of the Sherman Act is not so much its appreciation, under certain circumstances, to the multi-corporate enterprise, but its non-application, under similar circumstances to the single enterprises?"

See, for the unilateral approach of the Model Penal Code, which may help solve the problem, Wechsler, Jones and Korn, "The Treatment of Inchoate Crimes in the Model Penal Code of the American Law Institute: Attempt, Solicitation and Conspiracy" (1961), 61 Col. L.R. 957 at 965-7.

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The Journal is printed by Earl Whynot and Associates Limited, Trade Mart, Scotia Square, Halifax, Nova Scotia. All communications concerning subscriptions should be addressed to The Carswell Company Limited, 2330 Midland Avenue, Agincourt, Ontario M1S 1P7. The price of an individual copy is \$4.50.